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Peninsular Home Sdn Bhd v Ko Lim Tristar Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-03(IM)-63–10 OF 2020
LEE SWEE SENG, MARIANA YAHYA AND SEE MEE CHUN JJCA
8 JANUARY 2024

C *Damages — Assessment — Appeal against assessment — High Court affirmed assessment and award of damages by deputy registrar — Whether respondent's claim was for loss of profit or loss of gross revenue — Whether reliance on report as basis for amount of rental income was flawed — Whether respondent entitled to damages awarded*

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This was an appeal against the decision of the High Court judge ('HCJ') who affirmed the assessment and award of damages by the deputy registrar ('DR'). The respondent ('plaintiff') was the purchaser of 22 units of a development in Tower A of Menara UOA, Bangsar ('the premises'), while the appellant ('defendant') was the developer for the premises. After the execution of the booking form, a dispute arose between the parties resulting in the plaintiff commencing action against the defendant for specific performance and damages. In the liability proceedings, the High Court ordered the specific performance of the sale of the units to the plaintiff by the execution of sales and purchase agreements ('SPAs') and that damages be assessed. On 18 March 2014, the defendant executed the SPAs for the units in favour of the plaintiff. The plaintiff then filed an application of assessment of damages and the damages awarded was RM7,234,457.46. The defendant submitted that the plaintiff's claim, in essence, was a claim for loss of gross revenue and not loss of profit; and the plaintiff had failed to prove the fact and the amount of loss and that the loss of revenue could not be equated to loss of profit. Further, the plaintiff's reliance on the Raine Horne Zaki report ('RHZ report') as the basis for the amount of rental income between 2010 to 2014 was flawed. There was a further flaw on the calculation of the time period.

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Held, allowing the appeal in part:

(1) The plaintiff had adduced evidence for loss of rental revenue which did not amount to loss of profit. The plaintiff had to prove the profit which it would have made from the rental of the premises and not merely the total rental income that it would have received. The plaintiff could indeed claim for loss of profit but not loss of revenue. In the circumstances, the plaintiff was not entitled to claim the entire gross

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rental without having to bear the corresponding expenditures in relation to the premises (see paras 31 & 37).

(2) The RHZ report stated that the plaintiff as the landlord would be responsible for quit rent etc but these expenses were not deducted from the rental income claim made by the plaintiff. In addition, the RHZ report did not state the rental income for 2010. There was no basis for the plaintiff to assume that the rental for 2010 would be the same as for 2011. Therefore, the RHZ report could not be used as the basis of calculation of the rental income as it was lacking in analysis and details of how the calculation was arrived at. The plaintiff had not produced any credible basis to support the rental rate which was its claim for damages (see paras 44, 46, 49 & 53).

(3) It was not probable for the rental income to be calculated on 100% occupancy and that deductions could be made for costs and expenditure expended. The burden was on the plaintiff to prove its losses. The defendant had made a concession on the loss of the profit which the plaintiff could have made. The DR and HCJ had also given no reasons for accepting the figures and assumptions and for accepting the RHZ report. Under the circumstances, the assessment of damages by the HCJ and the DR was set aside and judgment to be entered for RM228,926.18 at 5% interest per annum was allowed (see paras 55–56 & 66–67).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan hakim Mahkamah Tinggi ('HMT') yang mengesahkan penilaian dan pemberian ganti rugi oleh timbalan pendaftar ('TAPI'). Responden ('plaintif') adalah pembeli 22 unit pembangunan di Menara A Menara UOA, Bangsar ('premis'), manakala perayu ('defendan') adalah pemaju bagi premis tersebut. Selepas penyempurnaan borang tempahan, pertikaian timbul antara pihak yang mengakibatkan plaintif memulakan tindakan terhadap defendan untuk pelaksanaan spesifik dan ganti rugi. Dalam prosiding liabiliti, Mahkamah Tinggi memerintahkan pelaksanaan spesifik penjualan unit kepada plaintif dengan melaksanakan perjanjian jual beli ('PJB') dan ganti rugi dinilai. Pada 18 Mac 2014, defendan telah melaksanakan PJB untuk unit yang memihak kepada plaintif. Plaintif kemudiannya memfailkan permohonan taksiran ganti rugi dan ganti rugi yang diberikan ialah RM7,234,457.46. Defendan menghujahkan bahawa tuntutan plaintif, pada dasarnya, adalah tuntutan untuk kehilangan hasil kasar dan bukan kehilangan keuntungan; dan plaintif telah gagal membuktikan fakta dan jumlah kerugian dan kehilangan hasil tidak boleh disamakan dengan kehilangan keuntungan. Selanjutnya, pergantungan plaintif terhadap laporan Raine Horne Zaki ('laporan RHZ') sebagai asas untuk jumlah pendapatan sewa antara 2010 hingga 2014 adalah cacat. Terdapat juga kecacatan pada pengiraan tempoh masa.

Diputuskan, membenarkan sebahagian rayuan:

(1) Plaintif telah mengemukakan keterangan bagi kehilangan hasil sewa yang tidak sama dengan kehilangan keuntungan. Plaintif perlu membuktikan keuntungan yang akan diperolehi daripada penyewaan premis dan bukan sekadar jumlah pendapatan sewa yang akan diterimanya. Plaintif memang boleh menuntut kehilangan keuntungan tetapi bukan kehilangan hasil. Dalam keadaan tersebut, plaintif tidak berhak untuk menuntut keseluruhan sewa kasar tanpa perlu menanggung perbelanjaan yang sepadan berhubung dengan premis tersebut (lihat perenggan 31 & 37).

(2) Laporan RHZ menyatakan bahawa plaintif sebagai tuan tanah akan bertanggungjawab untuk cukai tanah dan lain-lain tetapi perbelanjaan ini tidak ditolak daripada tuntutan pendapatan sewa yang dibuat oleh plaintif. Di samping itu, laporan RHZ tidak menyatakan pendapatan sewa bagi tahun 2010. Tiada asas untuk plaintif menganggap sewaan bagi tahun 2010 adalah sama seperti tahun 2011. Oleh itu, laporan RHZ tidak boleh digunakan sebagai asas pengiraan pendapatan sewa kerana ia kurang dalam analisis dan butiran bagaimana pengiraan itu dicapai. Plaintif tidak mengemukakan sebarang asas yang boleh dipercayai untuk menyokong kadar sewa yang merupakan tuntutan ganti ruginya (lihat perenggan 44, 46, 49 & 53).

(3) Tidak mungkin pendapatan sewa dikira pada 100% penghunian dan potongan boleh dibuat untuk kos dan perbelanjaan yang dibelanjakan. Beban berada pada plaintif untuk membuktikan kerugiannya. Defendan telah membuat konsesi ke atas kehilangan keuntungan yang boleh dibuat oleh plaintif. TP dan HMT juga tidak memberikan alasan untuk menerima angka dan andaian dan menerima laporan RHZ. Dalam keadaan tersebut, taksiran ganti rugi oleh HMT dan TP telah diketepikan dan penghakiman yang akan dimasukkan sebanyak RM228,926.18 pada kadar faedah 5% setahun dibenarkan (lihat perenggan 55–56 & 66–67).]

Cases referred to

Ban Chuan Trading Co Sdn Bhd v Ng Bak Guan [2004] 1 MLJ 411; [2003] 1 LNS 522, CA (refd)
Goo Sing Kar v Dato' Lim Ah Chap & Ors [2013] 3 MLJ 374, CA (refd)
Ismail v Haji Taib [1972] 1 MLJ 259; [1972] 1 LNS 47, FC (refd)
Othman bin Ali & 290 Ors v Bukit Lenang Development Sdn Bhd [2016] 3 MLJ 708, CA (refd)
Sime UEP Properties Bhd v Woon Nyoke Lin [2002] 3 CLJ 719, CA (refd)
Topaiwah v Salleh [1968] 1 MLJ 284, FC (refd)
United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182; [1993] 2 CLJ 31, SC (refd)

Yap Boon Hwa v Kee Wah Soong [2020] 1 MLJ 37; [2019] 1 LNS 1157, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 69

Appeal from: Originating Summons No S (22) 24–2644 of 2007 (High Court, Kuala Lumpur)

Joseph Ting (with Alan Tan Fu Seng) (Joseph Ting & Co) for the appellant.
Ong Kheng Leong (with Jeyasingam Balasingam, Moses Mathew George and Hee Hooi Chun) (Ghazi & Lim) for the respondent.

See Mee Chun JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the High Court judge ('HCJ') who on 23 September 2020 affirmed the assessment and award of damages by the Deputy Registrar ('DR') given on 22 January 2019.

[2] After having heard and considered the submissions of both parties, we allowed the appeal in part and set aside the assessment of damages of the HCJ and DR. We now give our reasons for doing so.

[3] The parties will be referred to as in the High Court.

PARTIES AND BACKGROUND FACTS

[4] The plaintiff who is the respondent here, is the purchaser of 22 units ('the units') of a development in Tower A of Menara UOA, Bangsar ('the premises'). The units are located on the 19th, 20th and 22nd floors of the premises.

[5] The defendant who is the appellant here, is the developer for the premises, which comprises of two office blocks and a podium for retail spaces.

[6] After the execution of the booking form on 4 October 2007, a dispute arose between parties. This resulted in the plaintiff commencing action against the defendant for specific performance and damages. In the liability proceedings, the High Court on 25 May 2012 ordered the specific performance of the sale of the units to the plaintiff by the execution of Sales and purchase agreements (S&Ps) and that damages be assessed. The defendant's

appeal on liability to the Court of Appeal was dismissed on 25 June 2013 and its application for leave to the Federal Court was dismissed on 19 November 2013.

[7] The defendant executed the S&Ps for the units in favour of the plaintiff on 18 March 2014.

[8] The plaintiff then filed the application of assessment of damages ('assessment proceedings') which proceeded by way of affidavits.

[9] The damages awarded was RM7,234,457.46.

SUBMISSIONS OF THE DEFENDANT (APPELLANT)

[10] It was submitted by the defendant that in a breach of contract, the plaintiff can claim for damages for either loss of profit or loss of expenditure. Here, the plaintiff was claiming for loss of profit from January 2010 (the date the defendant ought to have delivered vacant possession) until 17 March 2014 (the date the plaintiff actually received vacant possession). This was in essence a claim for loss of gross revenue and not loss of profit.

[11] It was submitted that the plaintiff had failed to prove the fact and the amount of loss and that the loss of revenue cannot be equated to loss of profit. The costs and expenditure such as service and maintenance charges, and other costs related to the premises, bank interest for the financing of the purchase of the premises and income tax payable on the profit, should have been deducted.

[12] Further the reliance on the Raine Horne Zaki Report ('RHZ Report') as the basis for the amount of rental income between 2010 to 2014 was flawed. This was because there was no data, documents and/or comparison of the area in the vicinity with the premises. There was no valuation for 2010 where the plaintiff assumed that the rent for 2010 would be the same as 2011. There was also no basis to calculate the rental income based on 100% occupancy.

[13] There was a further flaw on the calculation of the time period. The deposit had been paid on 4 October 2007 such that if the S&Ps had been signed in 2007, vacant possession ('VP') would be 36 months on 3 October 2010. The period for loss of rental income should start from 3 October 2010 and not January 2010. The computation too should not end at 17 March 2014.

SUBMISSIONS OF THE PLAINTIFF (RESPONDENT)

[14] It was submitted that it was an undisputed fact that the units are commercial units to be used solely for business purposes. The plaintiff is a property investment company as evident from its memorandum of association. The purpose for the purchase of the units was to generate rental returns and income. It was foreseeable and within the contemplation of parties on the purpose of the purchase.

[15] The defendant had acknowledged and adopted the same period for assessment and what was at variance was only the rental rates.

[16] No appellate interference was warranted on quantum. Further an appellate court should not reverse the concurrent findings of the DR and HCJ, save for in the most exceptional circumstances. Reference was made to *Goo Sing Kar v Dato' Lim Ah Chap & Ors* [2013] 3 MLJ 374 (CA) and *Topaiwah v Salleh* [1968] 1 MLJ 284 (FC).

[17] Damages in cases involving the deprivation of property are not subject to deductions as the principle is that the plaintiff should be entitled to receive a reasonable rental value of the units.

[18] The defendant had not adduced any evidence through an independent and professional valuation such that the DR and HCJ were correct to accept the plaintiff's RHZ Report. The RHZ Report had been prepared with the necessary investigation and took into account the prevailing market condition of similar properties in the locality and vicinity of the premises. The RHZ Report had given a range of rental whereby the plaintiff had taken the lesser rate in the range. The defendant's own exhibited documents support the lesser rental rates.

OUR DECISION

[19] The appeal concerns the issue of quantum of damages to be awarded to the plaintiff for the deprivation of the use of the units.

[20] At the outset, we note that there are no grounds prepared by the DR or the HCJ on the order of assessment of damages.

[21] We start with addressing the plaintiff's submission that as the subject matter of the appeal concerns the quantum of damages and given the concurrent findings of the DR and HCJ, an appellate court ought not to reverse such findings, except in the most exceptional circumstances. Two authorities were cited to support this proposition.

[22] The first case was *Goo Sing Kar* at pp 385–387:

> [29] Two preliminary matters require to be stated at the outset. First, the subject matter of the appeal concerned damages and its quantum, and therefore the principle that the court will be disinclined to reverse the finding of the trial judge as to the amount of damages should apply. The findings of the trial judge should not be reversed merely because the appellate court might be of the opinion that if they had tried the case at first instance they would have given a lesser sum. ...
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> [32] Thus, for the appellant to succeed he must show either (a) the trial judge has acted on some wrong principle of law, or (b) the trial judge has made an entirely erroneous estimate of the damages in the sense that it is so extremely high or so very small.
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> [33] The second preliminary matter concerned concurrent findings. On the facts of this appeal, there were concurrent findings of the deputy registrar and the High Court judge, and again I took note of the general principle, established by the Court of Appeal, that save in the most exceptional circumstances, the Court of Appeal will not upset concurrent findings. In *Milik Perusahaan Sdn Bhd & Anor v Kembang Masyur Sdn Bhd* [2003] 1 MLJ 6, for instance, this court has held as follows:
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> > ... it is a general principle upon which this court acts that save in most exceptional circumstances, concurrent findings of fact will not be gone into by us. But that is not to say that an appeal of this nature will never succeed. If the appellant can sufficiently demonstrate to a conviction that a serious error of principle has occurred in both the lower tiers of the High Court, this court will have no hesitation; and indeed we are duty-bound to correct the resultant error (at p 12 of the report)
>
> [34] On the facts of this present appeal, we found that the appellant had failed to demonstrate to that degree of conviction required by this general principle that there had been any serious error of principle on the part of the High Court judge when he heard the appeal from the assessment of damages by the deputy registrar.

[23] The second case was *Topaiwah* at p 285:

> Or another way of putting it — that it is a matter of assessment but not of calculation. So far as this court is concerned we should, to paraphrase Greer LJ in *Flint Levell* [1935] 1 KB 354, 360 be disinclined to reverse the finding of a trial judge as to the amount of damages merely because we think that if we had tried the case in the first instance we would have given a lesser sum. To justify reversing him, we should be convinced that he acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damage. The assessments which the courts have made over the years form some guide to the kind of figure which is proper and which the appellate court will follow in the light of the special facts of each particular case.

[24] We certainly agree with the legal proposition advanced that where the appeal concerns quantum of damages, we should be slow to reverse the concurrent findings of the DR and HCJ, except where there are exceptional circumstances.

[25] It is trite that an appeal to this court is by re-hearing as per s 69 of the Courts of Judicature Act 1964. This court may draw inferences of fact, and give any judgment, and make any order which ought to be have been given or made, and make such further or other orders as the case requires. We are therefore entitled to look at the entire evidence and make the necessary assessment.

[26] In this regard, the assessment proceedings proceeded by way of affidavits.

[27] In a breach of contract, the plaintiff can claim for loss of profit or loss of expenditure as damages. This is made clear in *Ban Chuan Trading Co Sdn Bhd v Ng Bak Guan* [2004] 1 MLJ 411; [2003] 1 LNS 522.

LOSS OF PROFIT PREMISED ON LOSS OF RENTAL

[28] It is not disputed that the plaintiff here is claiming for loss of profit by relying on loss of rental.

[29] In the affidavit in support (encl 50/26–33), the plaintiff has relied on the Raine Horne Zaki ('RHZ') Report as in exh 'OPN5' to form the basis of its loss of rental income and the calculation thereof (para 9). The RHZ Report is for the period 2011 to 2014 and for 2010 the plaintiff is proceeding on the basis that the rent for 2010 is the same for 2011 (paras 10 and 12).

[30] In para 12 too is set out the rental computation loss as follows:

Jumlah kaki persegi hartanah tersebut	Kadar Sewa Pasaran 2010 (RM5.50 kaki persegi) x 12 bulan	Kadar Sewa Pasaran 2011 (RM5.50 kaki persegi) x 12 bulan	Kadar Sewa Pasaran 2012 (RM5.50 kaki persegi) x 12 bulan	Kadar Sewa Pasaran 2013 (RM6.00 kaki persegi) x 12 bulan	Kadar Sewa Pasaran 2014 (RM6.50 kaki persegi) x 76 hari (1 Januari 2014 – 17 Mac 2014)
25,274	1,668,084	1,668,084	1,668,084	1,819,728	410,477.46

The total loss of rental income is RM7,234,457.46 (para 13).

[31] The above shows that the plaintiff has adduced evidence for loss of rental revenue which does not amount to loss of profit. This means that the plaintiff has to prove the profit which it would have made from the rental of the premises and not merely the total rental income that it would have received. This means that in order to generate the revenue in the form of rental, there has to be costs and expenditure expended. It cannot be the gross rental as was awarded.

[32] Support for this proposition can be found in *Ismail v Haji Taib* [1972] 1 MLJ 259; [1972] 1 LNS 47 where the Federal Court stated:

> As regards damages, as has already been stated the plaintiff claimed both special damages and general damages. Under special damages he claimed a sum of $1,224, the proceeds at $85 per kuncha of the padi which he estimated he would have harvested less the amount of padi he would have had to give the landlord by way of rent. The trial president allowed this claim though there was no evidence to show that the estimate was reasonable. Even if the estimate was reasonable, *the plaintiff should not have been awarded the full sum claimed ($1,224), because there should be deducted from it what he would have had to spend on producing the estimated amount of padi* ... (Emphasis added.)

[33] There is further a decision of this court in *Sime UEP Properties Bhd v Woon Nyoke Lin* [2002] 3 CLJ 719 at p 740:

> It is clear from the authorities that *in order to succeed in claims for damages for loss of profit one must establish the actual losses one would have suffered as a result of the breach.* A projection as in this case is not sufficient to establish the would be losses of profit. A venture into a business would not necessarily mean that one can make a profit out of it because there are instances where people suffer losses. Not all businesses end up with a profit. It is clear to us that the respondent failed to establish the expected losses as a result of the breach. (Emphasis added.)

[34] The plaintiff had relied on a decision of this court in *Othman bin Ali & 290 Ors v Bukit Lenang Development Sdn Bhd* [2016] 3 MLJ 708 that the plaintiff is entitled to damages measured by reference to rental and it need not have suffered actual loss and irrespective of whether it could have rented out the units. It was said at pp 718–719:

> [31] It was undeniable that in a normal case where once a trespass to land or a deprivation of use of land had been established, the normal measure of damages to be applied would be the actual proof of 'loss of rental' or a reasonable estimation of such a 'rental return' that was directly attributable and flowing from a lawful use of the land but denied by that wrongful action. This was consistent with the two underlying basic principles in law which required that any damages awarded would, so far as money can, put the affected or deprived party in the same position as he would have been if the tort had not occurred subject to the further overriding consideration that such damages to be awarded was in any event not too remote or speculative in nature.

[32] In *Inverugie Investments v Hackett* [1995] 3 All ER 841, the Privy Council opined (in an appeal from the Bahamas Court of Appeal) that although the plaintiff might not have suffered any actual loss by being deprived of the use of property, he was still entitled to recover a reasonable rent for the wrongful use of his property by the trespasser, and similarly, even if the trespasser might not have derived any actual benefit from the use of the property, he was still obliged to pay a reasonable 'rent' for the benefit or use he enjoyed based on what has been termed as the 'user principle'.

Lord Lloyd of Berwick delivering the advice said as follows:

... of the landlord of residential property, can recover damages from a trespasser who has wrongfully used his property whether or not he can show that he would have let the property to anybody else, and whether or not he would have used the property himself. The point is well expressed by Megaw LJ in *Swordheath Properties Ltd v Tabet* [1979] 1 All ER 240 at p 242; [1979] 1 WLR 285 at p 288 as follows:

> It appears to me to be clear, both as a matter of principle and of authority, that in a case of this sort of the plaintiff, when he has established that the defendant has remained on as a trespasser on residential property, is entitled, without bringing evidence that he could or would have let the property to someone else in the absence of the trespassing defendant, to have as damages for the trespass the value of the property as it would fairly be calculated; and, in the absence of anything special in the particular case it would be the ordinary letting value of the property that would determine the amount of damages.

It is sometimes said that these cases are an exception to the rule that damages in tort are compensatory. But this is not necessarily so. It depends how widely one defines the 'loss' which the plaintiff has suffered. As the Earl of Halsbury LC pointed out in *Mediana (owner) v Comet (owners), The Mediana* [1900] AC 113 at p 117; [1900–3] All ER Rep 126 at p 129, it is no answer for a wrongdoer who has deprived the plaintiff of his chair to point out that he does not usually sit in it or that he has plenty of other chairs in the room ...

[35] The aforesaid para 31 of *Othman bin Ali* states that where deprivation of use of land is established, the normal measure of damages is '*actual proof of loss or rental*' or '*a reasonable estimation of such a rental return*' (Emphasis added). It is not stated anywhere that there is no need for actual loss or renting out.

[36] It is only in para 32 that it is stated that 'although the plaintiff *might not have suffered any actual loss* by being deprived of the use of property, he was *still entitled to recover a reasonable rent for wrongful use of his property by the trespasser*' (Emphasis added). This is with reference to a landlord-trespass situation which is not our case here.

[37] The plaintiff can indeed claim for loss of profit but not loss of revenue, which is the essence of its claim. In the circumstances, the plaintiff is not entitled to claim the entire gross rental without having to bear the corresponding expenditures in relation to the premises.

[38] While the measure of damages in deprivation of property may be reasonable rental value, this has to be subject to deductions that the plaintiff would have to spend in order to produce the revenue as per *Ismail v Haji Taib*.

[39] Reference was also made to *McGregor on Damages* (15th Ed) at paras 911 and 914 at pp 581–582 as follows:

> 911 ... More often he will have the property transferred to him late, either because the delay does not discharge the contract or he elects not to treat the delay does not discharge the contract or he elects not to treat the delay as a discharge, or because he forces the seller's hand by successfully suing for a decree of specific performance. In such a situation the measure of damage is properly regarded as damages for delay.
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> ...
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> 914 The normal measure of damages is the value of the of user of the land, which will generally be taken as its rental value, for the period from the contractual time for completion to the date of actual completion. This is so whether the delay is brought to an end by the voluntary action of an indolent seller or by a decree of specific performance against a recalcitrant seller ...

While the above passages may support the proposition that rental value is claimable, they do not go to the extent of saying that there need not be no actual loss.

RAINE HORNE ZAKI REPORT

[40] The Raine Horne Zaki (RHZ) Report which is exh 'OPN5' to the Affidavit in Support is to be found in encl 23/138–151. Although we have referred to it as the RHZ Report, it is termed as a Certificate of Rental Valuation. Since the RHZ Report was relied upon by the plaintiff and appears to be the basis for the DR and HCJ to award damages of RM7,234,457.46, we find it necessary to set it out in *extenso* at pp 140–141:

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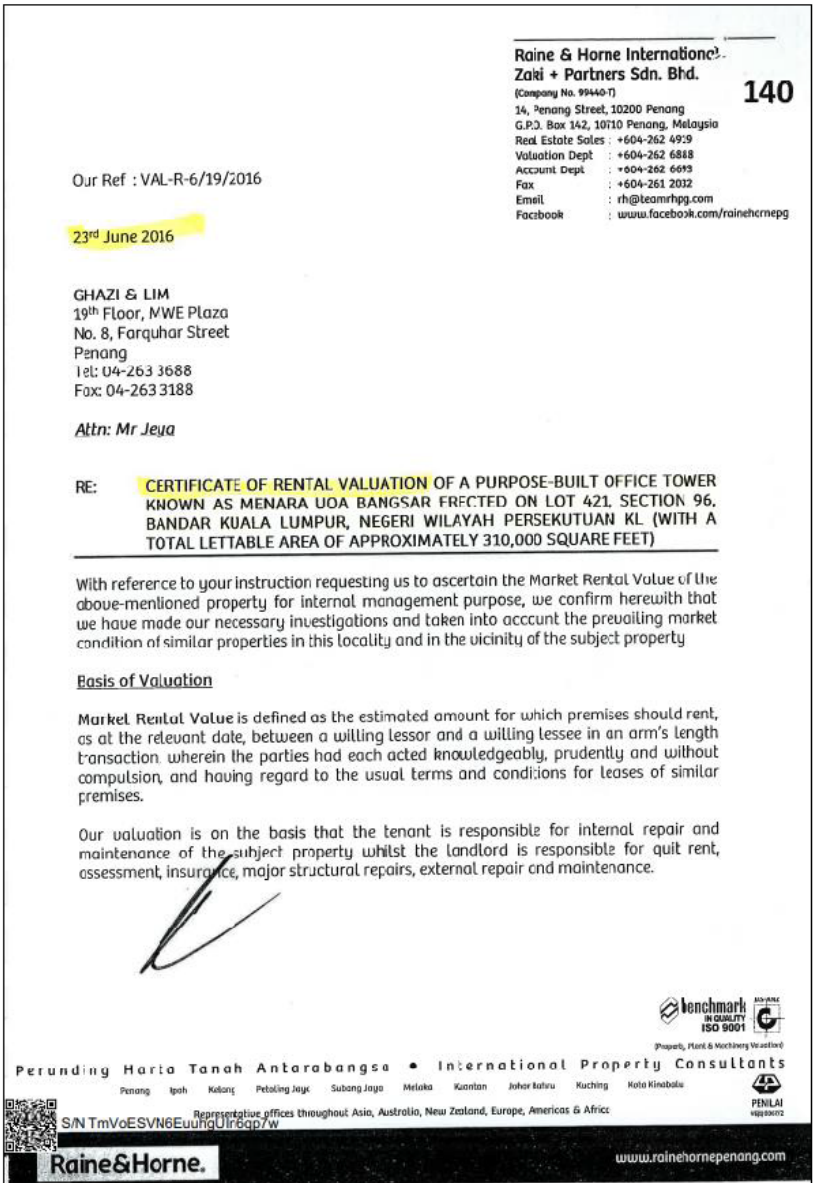

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140

Our Ref : VAL-R-6/19/2016

23rd June 2016

GHAZI & LIM
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Penang
Tel: 04-263 3688
Fax: 04-263 3188

Attn: Mr Jeya

RE: CERTIFICATE OF RENTAL VALUATION OF A PURPOSE-BUILT OFFICE TOWER KNOWN AS MENARA UOA BANGSAR ERECTED ON LOT 421, SECTION 96, BANDAR KUALA LUMPUR, NEGERI WILAYAH PERSEKUTUAN KL (WITH A TOTAL LETTABLE AREA OF APPROXIMATELY 310,000 SQUARE FEET)

With reference to your instruction requesting us to ascertain the Market Rental Value of the above-mentioned property for internal management purpose, we confirm herewith that we have made our necessary investigations and taken into account the prevailing market condition of similar properties in this locality and in the vicinity of the subject property.

Basis of Valuation

Market Rental Value is defined as the estimated amount for which premises should rent, as at the relevant date, between a willing lessor and a willing lessee in an arm's length transaction wherein the parties had each acted knowledgeably, prudently and without compulsion, and having regard to the usual terms and conditions for leases of similar premises.

Our valuation is on the basis that the tenant is responsible for internal repair and maintenance of the subject property whilst the landlord is responsible for quit rent, assessment, insurance, major structural repairs, external repair and maintenance.

benchmark IN QUALITY ISO 9001

(Property, Plant & Machinery Valuation)

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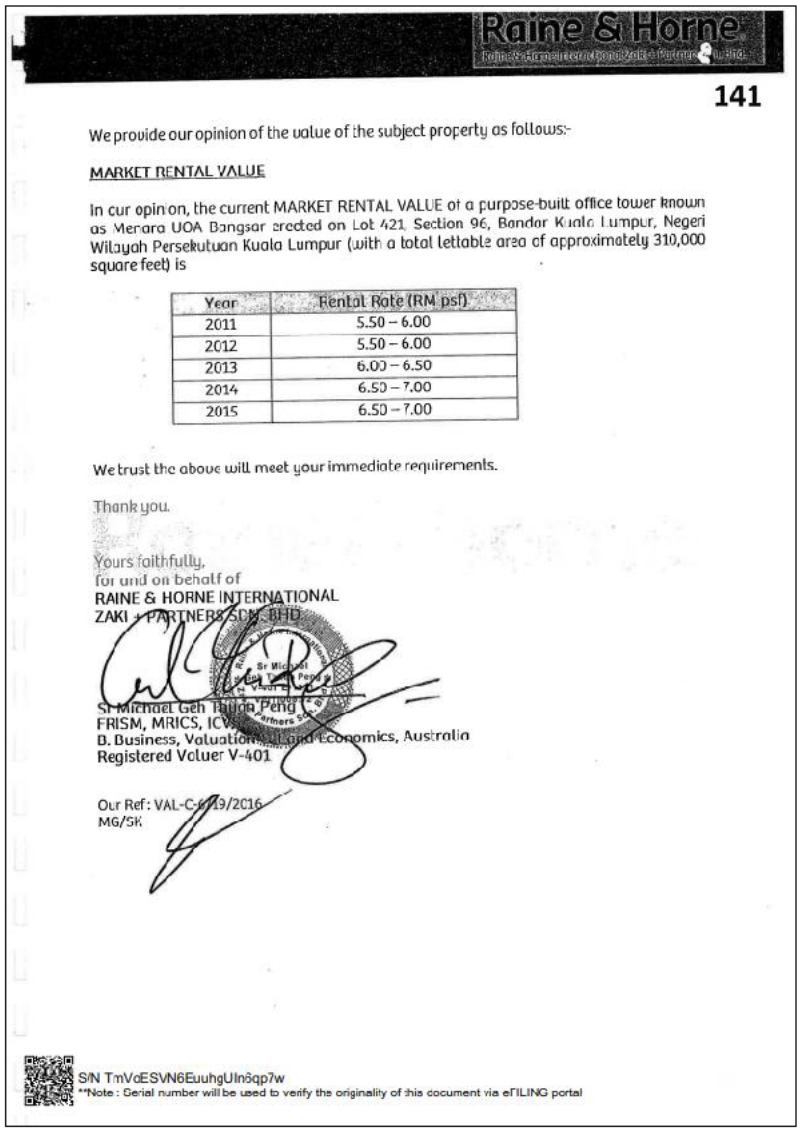

Raine & Horne

141

We provide our opinion of the value of the subject property as follows:-

MARKET RENTAL VALUE

In our opinion, the current MARKET RENTAL VALUE of a purpose-built office tower known as Menara UOA Bangsar erected on Lot 421, Section 96, Bandar Kuala Lumpur, Negeri Wilayah Persekutuan Kuala Lumpur (with a total lettable area of approximately 310,000 square feet) is

Year	Rental Rate (RM psf)
2011	5.50 – 6.00
2012	5.50 – 6.00
2013	6.00 – 6.50
2014	6.50 – 7.00
2015	6.50 – 7.00

We trust the above will meet your immediate requirements.

Thank you.

Yours faithfully,
for and on behalf of
RAINE & HORNE INTERNATIONAL
ZAKI + PARTNERS SDN. BHD.

Sr Michael Geh Tiang Peng
FRISM, MRICS, ICVS
B. Business, Valuation, Land Economics, Australia
Registered Valuer V-401

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[41] What follows next are photographs of the premises, namely the subject tower, the ground floor, the subject units and internal views (pp 142–151).

[42] At para 1, it was stated that 'we confirm herewith that we have made our necessary investigations and taken into account the prevailing market condition of similar properties in this locality and in the vicinity of the subject property'. However, nothing else was said as to what these investigations were, what the prevailing market condition of similar properties were, where exactly were these similar properties, where the words 'in this locality and in the

vicinity' are too general. We find that no explanation, details and analysis were given to support the rental range given. A

[43] At paras 2 and 3, the basis of valuation is given. Paragraph 2 defines 'market rental value' in general terms. Paragraph 3 then states: B

> Our valuation is on the basis *that the tenant is responsible for internal repair and maintenance of the subject property whilst the landlord is responsible for quit rent assessment, insurance, major structural repairs, external repair and maintenance*. (Emphasis added.)

C

[44] This means the RHZ Report itself stated that the plaintiff as the landlord would be responsible for quit rent etc but these expenses were not deducted from the rental income claim made by the plaintiff.

[45] Other than that, there really was nothing for this court to evaluate how the rental rate was arrived at. D

[46] In addition, the RHZ Report did not state the rental income for 2010. There was no basis for the plaintiff to assume that the rental for 2010 would be the same as for 2011. This was an assumption without a basis. E

[47] In *Yap Boon Hwa v Kee Wah Soong* [2020] 1 MLJ 37; [2019] 1 LNS 1157, this court had occasion to say the following:

> [75] The learned High Court judge further relied on the Quantity Surveyor's Report to state that the Rawang Land Project is in actual fact a loss making project. However the learned High Court judge failed to appreciate that the quantity surveyor had already confirmed that the Report was prepared based on the 'SelangorKu' guidelines which has yet to come into force and only applicable for development of land less than 2 acres. Clearly, it is not applicable to the Rawang Land Project in ascertaining whether there is a loss. Whatever findings in the report would be inaccurate and inapplicable to the Rawang Land Project. The learned High Court judge held that in the absence of any other comparables adduced by the second plaintiff, the court has no other choice but to accept the Quantity Surveyor's Report. This, we found to be erroneous *as it is always the burden on the claimant to prove his claim for damages with supporting evidence and credible valuation. It cannot be a situation where the defendant simply throws to the court any form of report or valuation which is not applicable to the case in question, especially in the present case, where the 'SelangorKu' guidelines is not applicable and not enforced yet. The court cannot be forced to accept any kind of reports to satisfy the claims by the defendant despite such reports being unreliable as the basis is wrong and not applicable for development which is more than 2 acres. It is trite law that the burden is on the claimant to provide credible basis for his claim*. (Emphasis added.)

F G H I

[48] Much earlier, the Supreme Court in *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182 at p 182; [1993] 2 CLJ 31 at

p 36 entirely agreed with a passage in the text book *The Identification of Handwriting and the Cross-examination of Experts* by MK Mehta as follows:

> It is common failing in a number of experts that they do not clearly state their reasons on which they base their opinions while submitting the reports to the courts. The result is that the courts as well as the lawyers suffer from a distinct disadvantage. It is extremely difficult for them in such cases to test and verify the correctness of the opinions given. The mere opinion of the expert that a particular writing or signature is written or not written by the writer whose standard admitted writings or signatures were supplied to him for comparison, without any cogent reason, is not enough. The function of the expert is to give his honest opinion and place before the court all the data on which he bases his opinion, because it is the court who has to decide the case and accept or reject his opinion. *In the absence of a clear and precise statement of his reasons, it is difficult for the court to appreciate the opinion of the expert. It is also not fair to the opposite side who is to cross-examine the expert on the correctness of his opinion. Any opinion given without stating the reasons is valueless and is of no use as evidence*. (Emphasis added.)

[49] We are therefore of the considered opinion that the RHZ Report cannot be used as the basis of calculation of the rental income as it was lacking in analysis and details of how the calculation was arrived at.

[50] The contention by the plaintiff that the defendant did not produce any independent and professional valuation meant the HCJ and DR were right to accept RHZ Report, is without merit. This is because this court is not compelled to accept any kind of report where such report is unreliable and without any basis. Further, the burden is always on the plaintiff to provide credible basis for its claim.

[51] The fact that the plaintiff had used the lower end of the rental range in the RHZ Report does not negate the unreliability of the Report. The same goes for the contention that the defendant's exhibited documents supported the rental rates.

[52] The RHZ Report proceeded on a rental income based on 100% occupancy. We find and agree with the defendant that it is not probable for Menara UOA with two office towers and a combined space of 40 over floors to be 100% occupied within the first few years of VP.

[53] Shorn of the RHZ Report, the plaintiff has not produced any credible basis to support the rental rate which was its claim for damages.

DAMAGES TO BE AWARDED

[54] Arising from the above, it behoves upon us to determine the appropriate amount of damages to be awarded to the plaintiff rather than the RM7,234,457.46 awarded which was gross rental.

[55] We find and agree with the defendant that it is not probable for the rental income to be calculated on 100% occupancy and that deductions can be made for costs and expenditure expended.

[56] The defendant had correctly submitted that the burden is on the plaintiff to prove its losses. The defendant had taken upon itself to adduce documents to show the probable occupancy rate and the deductions for maintenance charges and sinking fund, insurance, quit rent and assessment, water and fixed sewerage charges and financier interests at 5.75%. The documents for probable occupancy rate are in RR Vol 8/12, pp 77–101, Vol 9/12 p 103 and 106–156 and derived from the record of renovation deposits. We find there is indeed a co-relation between renovation work as reflected in the renovation deposits and occupancy.

[57] According to the defendant, based on the occupancy rate, the computation of the rental income for the premises would be RM4,046,285.49.

[58] The documents for the tabulation of maintenance charges and sinking fund, insurance, quit rent and assessment, water and fixed sewerage charges for the premises are in RR Vol 8/12, pp 4–200 and Vol 9/12, pp 1–76. As may be recalled, the RHZ Report had stated that the plaintiff as the landlord would have to be responsible for quit rent, assessment, insurance and maintenance. Further, these are outgoings in respect to a landlord's obligation when renting out.

[59] The documents for the financing costs are shown in RR Vol 10/12, pp 45–71 and Vol 9/12 pp 155–156. These are in respect of what the plaintiff would have to pay as interest had it executed the S&Ps in 2007.

[60] Contrary to the plaintiff's assertion, all the above are not self-serving documents but are supported by documents such as receipts for charges imposed, receipts for renovation approval, actual tenancy agreements and prevailing interest rate charged by commercial banks.

[61] As for the calculation of the time period, we find that the defendant has used the same period for assessment as the plaintiff's, namely 1 January 2010 to 17 March 2014.

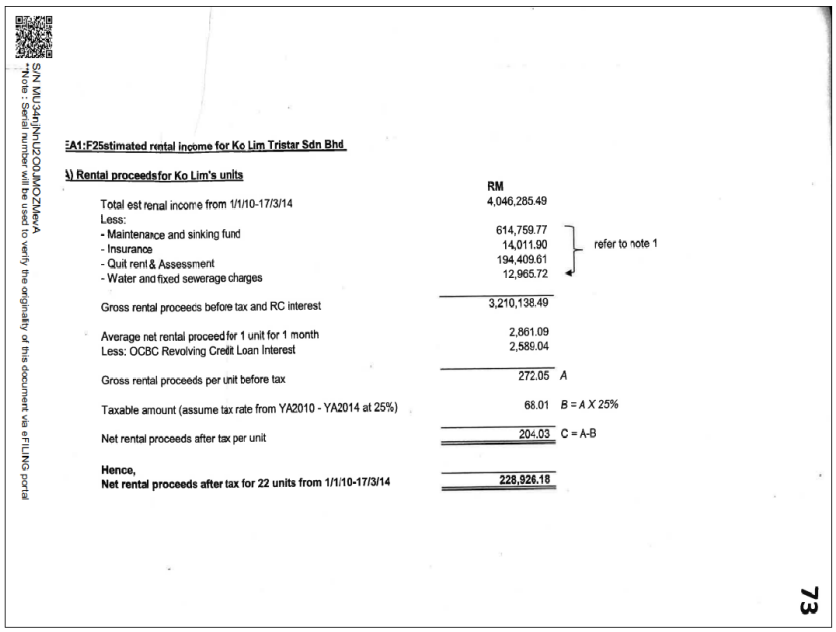
[62] In its written submissions dated 1 June 2023, the defendant had submitted the following as loss of rental income after the necessary deductions:

Total estimate rental income (from 01.01.2010 – 17.03.2014)	RM4,046,285.49
Less	
(i) Maintenance and sinking fund	(RM 614,759.77)
(ii) Insurance	(RM 14,011.90)
(iii) Quit Rent and Assessment	(RM 194,409.61)
(iv) Water and fixed sewerage charges	(RM 12,965.72)
Financier interests of 5.75%	(RM4,071,007.55)
Net rental profit/(loss)	(RM 860,869.06)

[63] We however find that in para 19 of the defendant's affidavit in reply (2) affirmed on 19 March 2018 (encl 17/71) that the defendant had made a concession on the loss of profit that the plaintiff could have made to be RM228,926.18. The relevant part reads as follows:

> ... menunjukkan bahawa Plaintif hanya akan menerima keuntungan sebanyak RM228,926.18 selama tempoh tersebut. Kini dikemukakan dan ditunjukkan kepada saya ditandakan sebagai Ekshibit 'A14' adalah sesalinan pengiraan tersebut.

[64] Exhibit 'A14' as found in encl 27/73 shows the calculation as follows:



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EA1:F25stimated rental income for Ko Lim Tristar Sdn Bhd

A) Rental proceedsfor Ko Lim's units

	RM	
Total est renal income from 1/1/10-17/3/14	4,046,285.49	
Less:		
- Maintenance and sinking fund	614,759.77	refer to note 1
- Insurance	14,011.90	
- Quit rent & Assessment	194,409.61	
- Water and fixed sewerage charges	12,965.72	
Gross rental proceecs before tax and RC interest	3,210,138.49	
Average net rental proceed for 1 unit for 1 month	2,861.09	
Less: OCBC Revolving Credit Loan Interest	2,589.04	
Gross rental proceeds per unit before tax	272.05	A
Taxable amount (assume tax rate from YA2010 - YA2014 at 25%)	68.01	B = A X 25%
Net rental proceeds after tax per unit	204.03	C = A-B
Hence, **Net rental proceeds after tax for 22 units from 1/1/10-17/3/14**	**228,926.18**	

73

[65] This amount also factors in the deduction in respect of the tax payable on the rental income, which is again an expenditure.

[66] We must always bear in mind that that the burden of proof lies on the plaintiff. Here the defendant had made a concession on the loss of the profit which the plaintiff could have made. The DR and HCJ had also given no reasons for accepting the figures and assumptions and for accepting the RHZ Report. Under the circumstances, where the appeal is a re-hearing, we have looked at the entire evidence and made the necessary assessment based on the affidavits.

CONCLUSION

[67] For the above reasons, we allow the appeal in part and set aside the assessment of damages of the HCJ and DR and allow judgment to be entered for RM228,926.18 at 5% interest per annum from 22 January 2019 which is the date of assessment of the DR. We award costs of RM20,000 to the defendant, subject to allocatur.

Appeal allowed in part.

Reported by Ahmad Ismail